INTERNATIONAL LAW STUDENTS ASSOCIATION

2223 Massachusetts Avenue, N.W.
Washington, D.C. 20008-2864 U.S.A.
1-202-939-6030
CABLE "AMINTLAW"
FAX 1-202-265-0385

CONGRESS OF
INTERNATIONAL LAW SOCIETIES
PHILIP C. JESSUP
INTERNATIONAL LAW
MOOT COURT COMPETITION
CONFERENCE OF
INTERNATIONAL LAW JOURNALS

THE JESSUP JUDGES' HANDBOOK

Introduction

What is the Jessup Competition?

The Philip C. Jessup International Law Moot Court Competition, established in 1959, provides students of international law in nations around the world with an opportunity to argue important and timely questions of international law. Each year, over 300 teams from some 50 countries participate in the Jessup Competition, making it the largest moot court competition in the world.

The Competition is named after Philip C. Jessup, former judge on the International Court of Justice in The Hague. The competition involves a hypothetical case written by leading international law scholars. Past cases have centered around issues of space law, human rights, international antitrust and GATT, environmental law, and diplomatic immunity, among other pressing issues.

The competition is held annually, with Regional and National Competitions taking place around the world from December through March of each year. The International Rounds and World Championship Round are held each Spring, usually in Washington, D.C., during the Spring Congress of the International Law Students Association (ILSA), administrator of the Jessup, and the Annual Meeting of the American Society of International Law (ASIL), which co-sponsors the competition.

Teams are composed of two to five members from a single law school or international law-related faculty. Each team argues prepared memorials (briefs) and presents oral arguments on both sides of the question. The Competition is judged by a series of three-judge panels, comprised of judges, scholars and practitioners who simulate the practice of law before the International Court of Justice. Competition winners are selected on the basis of the cumulative scores for their oral arguments and written memorials (briefs).

Competition Procedures

In late summer of each year, Jessup materials and invitations are mailed to all law schools in the world. Each school is provided basic organizing materials, Competition Rules, the Competition Problem and registration information.

Each participating school selects its team through its own internal procedure. In the US, ILSA member societies are given the right of first refusal to field the school's team. Should

they decline this right, the school can administer the team as part of the moot court program or another academic program, such as a course or seminar. In other nations, Competition administration is handled by a volunteer National Administrator, who, in conjunction with the Jessup Administrator, determines the policies and procedures for participation in each nation.

Teams must be officially selected and registered by early November of each year. During the fall, teams work on their oral argument procedures and research and write their team memorials. Clarifications to the problem submitted by participating teams are issued in late-November to answer specific team inquiries. At approximately the same time, all teams are assigned numbers to ensure objectivity throughout the Competition.

Once all team registrations are received, the Jessup Administrator assigns registered teams to Regional or National Competitions. At each level, teams will argue against three opposing teams. Teams are scored on the basis of their written memorials and their oral advocacy skills. The winners of these Competitions advance to the International Rounds.

The International Rounds of the Competition are held in late March or early April of each year. Each nation is allowed one representative for every 10 participating universities. Each team will face four other teams drawn at random in the preliminary rounds. Based upon the scores achieved in these rounds, the top teams will advance to the International Quarterfinals and Semifinals. These teams, through single elimination rounds, argue until a World Champion is determined.

The Bench Memorandum

The memorandum shall be divided into two general categories of comments: Comments intended to assist judges in judging the Jessup Competition generally; and comments intended to assist the judges in evaluating the participants' performance. Neither set of comments is intended to be either dispositive or exhaustive. The comments are merely guidelines which, hopefully, will make the Jessup Competition rewarding for judges and competitors alike.

The 1996 Jessup Problem was drafted to allow students the maximum opportunity to address the current state of international law and to encourage the imaginative application of legal principles. The relevant international instruments and determinative factual references were kept to a minimum to allow participants the ability to approach the problem creatively and to ensure that neither side was given an advantage. Judges should take care to note the the many twists and turns which participants' arguments could possibly take as they study the Bench Memoranda and Problem.

Rules

The substantive rules of judging the Jessup Competition are set forth in the rules promulgated by the International Law Students Association, and, as they are available to judges through the ILSA office, shall not be repeated here. Judges should try to be familiar with these rules to avoid controversy during the competition by consulting with their Regional, National, or International Administrator.

Judges are also asked to review carefully the instructions provided with the Memorial Scoresheets or Oral Argument Scoresheets, as these contain an abbreviated list of general judging criteria upon which judges should formulate their opinions.

Philosophies on Judging the Jessup

There are differing opinions as to what role a judge should play in a moot court competition. On the one hand, there are those who believe that a judge should do whatever is necessary to ensure that the competitors complete their entire presentation. At the other extreme are those who believe that competitors are tested only when they spend their entire allocation of time responding to questions.

There is no "correct" position on this issue. However, when judges ask questions sufficient to prevent the competitors from merely giving a rehearsed speech, many of those involved with the competition in the past agree that such an approach works well. In any event, a rehearsed presentation is not particularly interesting from the judges' standpoint, and, when asked, competitors have indicated that they do not enjoy passive benches--it is to each judge to balance these two extremes.

Judges in the Jessup Competition play a different role than those in the real world. They do not indicate the determinations they have made in the form of opinions, but rather are there to assess the validity of the participants' arguments, the persuasiveness of their presentation and the thoroughness of their preparation.

Judges are encouraged to review the Statute of the Court prior to the competition to familiarize themselves with the basic jurisdictional and theoretical nature of that body.

Judges are expected primarily to judge the performance of the participants as outlined by the criteria noted on the judging forms for the written and oral aspects of the competition. Once submitted, participants may not revise their written memorials. As they advance through the competition, however, participants are sure to revise their argumentative style and legal presentation. It is important that judges in the oral rounds keep this fact in mind, as their questions and reponses to the participants should be formulated so as to encourage that learning process.

There are certain tactics judges in the oral rounds can employ to test a competitor's flexibility without unduly interfering with the competitor's performance. These include asking a competitor to resolve apparent internal contradictions between her position and that of her partner; or asking about the particular remedy sought for a particular international delict. In these ways, a judge can make a meaningful contribution to a performance without being unduly intrusive.

A judge should refrain as much as possible from insisting upon an answer to a question when it appears as if a competitor has already made a good faith effort to respond. In the final analysis, a moot court competition should, as much as possible, emulate a real courtroom to maximize the learning experience for the competitors. Just as there is no truly "correct" judging style in a courtroom, there is no correct judging style in a moot court competition.

As concerns the legal arguments to be made by the competitors, it is important to keep in mind that the competitors choose neither the problem nor the side of the issue that

they argue. In spite of every attempt to make the Compromis factually and legally equal as between the parties, inevitably international law favors one side or the other. As such, a competitor may be forced into making a weak legal argument. This by itself should not be held against the competitor. On the other hand, if the competitor incorrectly states the law, mis-cites a holding, or is unaware of an obvious source of relevant international law, a judge should bring it to the attention of the competitor through questioning and scoring.

It appears that, in the past, judges who do not have a strong background in international law have hesitated to ask questions during the oral rounds for fear that such questions are too fundamental. It is important, however, to have those questions asked to ensure the competitors have an understanding of the fundamental issues and are not merely regurgitating memorized details. Further, in a real courtroom, it is often the case that a judge is not expert in the substantive law at issue. Pertinent fundamental questions are as appropriate as the more complex questions.

Recommended Line of Questions

The following are some specific suggestions for questioning:

1) Frequently utilize questions which call for a "yes" or "no" answer. They test a competitor's ability to answer a question directly, and the questions themselves tend to be shorter and more concise.

2) Avoid asking rhetorical questions or making statements. The competitors have invested

3) Avoid lengthy debates with the competitors. As much as possible, the interaction between the competitors and the bench should be in question and answer format.

4) Do not focus all of your questioning on one competitor or team. Try as much as possible to interject evenly throughout the round.

5) Avoid detailed questioning about a co-counsel's argument. Each competitor should outline the beginning of his or her presentation the points he or she will cover. Although it is sometimes difficult to avoid questioning on a co-counsel's argument, such questioning should be general in nature when necessary.

6) Avoid extensive questioning after time has expired, which requires in part being cognitive of the time elapsed for a particular presentation (which will be constantly updated by the court bailiff).

7) If there is a competitor in the round who is not a native speaker of English, it is important to word questions carefully. It is especially important in these instances to avoid asking questions with overly complex sentence structure.

Evaluating the Arguments

Competitors should be evaluated in two primary areas. First, of course, is their knowledge of international law and their command of the information relevant to the case. Second, the competitors must be able to communicate their knowledge in an understandable an organized way. When evaluating the arguments, particularly the oral arguments, the judge should consider how well the competitor has grasped and explained the international issues involved in the case.

Keep in mind that the material presented here or in the bench memorandum is not exhaustive, but merely illustrative of the legal issues and authorities which may be discussed by the competitors. The illustrative nature of these materials should be kept in mind when evaluating competitors--as they have been researching the problem for several months, they may have found issues and authority not presented here that are equally relevant to the proceedings. While judges should not typically inquire into remote or even irrelevant tangential issues, judges should reward competitors for imaginative treatment of the Problem.

Judges are also encouraged to gather with their counterparts on the bench for each oral round of the competition and briefly discuss the Problem, their areas of specialty and where they expect to be the most active during the arguments, and to share their views on judging and any interesting points they may have noted in previous rounds. The Jessup Competition is, first and foremost, an educational experience. Just as no professor would present a lecture without first reviewing background materials and outlining an approach, we hope that the judges in the Jessup Competition will take a similar view of the role they play as part of the student's education in international law.

The Jessup Problem was drafted to allow participants an opportunity to address current law and to encourage legal imagination in its application. The relevant international instruments were kept to a minimum here to allow participants to discover and come forward with a variety of international legal instruments that arguably bear on the issues, as evidence of customary law. A few paragraphs follow that should be useful to newcomers to the Jessup, especially judges in the oral sessions.

Scoring

The Jessup Competition uses a rather elaborate scoring system that is weighted to ensure that all aspects of the written and oral performance are taken into consideration. In brief, the memorials are scored spearately by a variety of judges, three judges reviewing each team's written submissions and three judges scoring each round of oral argument. The judges evaluate each of the team's memorials on a scale of 50 to 100 (100 being highest). An average score should be 75. A standard is provided on the scoresheets to guide you in choosing the most appropriate score or range of scores. Even if you disagree with the range of scores recommended on the scoresheet, it is important to follow the standard to keep scores consistent throughout the competition.

I. JUDGING THE JESSUP

Judges in the Jessup Competition exercise their competence in a different way from those who sit on the World Court. Jessup Judges do not issue opinions. Although they may address the participants informally, they do not provide an oral judgment, and they are not expected to indicate what determinations they made. They are expected to meet collegially at the Competition and to consider among themselves the arguments presented orally and in the memorials.

Judges are expected primarily to judge the performance of the participants. Standards for grading the oral arguments and memorials are provided by the Jessup office. The written memorials are not revised once submitted, while the participants who ascend the competitive ladder have the unique oportunity to develop and refine their oral arguments and to take both sides of the issues.

Several other factors should be mentioned: much of the quality and the standards of the Jessup Competition depend upon the scrupulous exercise of fairness among the judges, upon their meeting the highest standards in judging what the participants are saying and the arguments that the contestants are making, and upon their pursuing questions that lead to probing the skills, competence, and advocacy of the contestants. The contestants as well as the audience sense this challenge.

The Jessup is not a tutorial or a lecture course. It is not intended to set the stage for up-staging the participants. It is not a platform where the judges are expected to monopolize the time, either in formulating complex questions, or providing commentary, or asking questions and failing to get answers, to provide their own. Judges should not attempt to show the participants and the audience how much they know about the Problem, the arguments, their grasp of international law, and possible solutions. The use of the Bench as a podium for teaching the participants international law should be carefully avoided.

The participants learn as they pass from one level to the next from information they gain from questions raised. They build on this process until those who reach the final round find that they have refined their thinking and oral arguments substantially. They cannot, of course, modify their written briefs.

The Jessup bench is not a place to attack or engage in deep criticism of the participants, nor to "show them up." The Jessup should encourage a high level of dignity among contestants and judges alike. If it does, the Jessup will continue to be a major instrument for shaping the thinking of all concerned with international law. The Competition offers a unique opportunity to provide a simulation or gaming device to test thinking and theories about the law applicable to cases intended to be drawn from real world problems. Once published, the Jessup and its materials should become a resource for others to draw upon.

The Jessup is more than a moot because international law is at a stage where much needs to be done at the philosophical or conceptual level. This effort can be stimulated through Jessup Competitions. Stimulus in part arises from deep-seeded and long enduring effort in a law application problem, but it may also be aroused by a realization in all participants that the Jessup can be the means to promote international law as such. The

Jessup Problem may be used as a teaching instrument. One Problem has already appeared in a text for that purpose.

This memorandum does not purport to be a primer on international law nor does it set forth all of the issues, approaches, or problems raised in the main Problem. It is designed to offer guidelines only. Much depends on the judges, specifically on their listening closely to the participants and, as in all I courts, eliciting the perspectives of the contestants as to the applicable law, the facts to which it is applied, and the legal implications of their efforts. Although not specifically required, judges may be able more effectively to fulfill their functions if they come together prior to the Competition. This may compensate for the fact that most judges have not had an opportunity to serve on the bench over a period of time and they will also gain the collegiate experience such an opportunity affords.

1. Background in International Law

The judges may wish to consult the texts and opening chapters of casebooks on international law to refresh their own recollections about the law. During the judging, they will be questioning the participants concerning customary international law and the shared expectations of states.

Participants will be invoking treaties, and judges may find the Vienna Convention on the Law of Treaties especially useful. Although some of its major provisions are controversial, it may provide a more precise framework for analysis.

Judges may draw upon general principles of law and use those principles to fill gaps in the law or to question the participants about the direction they are attempting to go. Although judges may be mindful of certain prominent jurists or important cases involving the issues, caution is recommended. The Problem is not designed as a "United States" domestic law problem, intended for U.S. solutions. The Problem does not raise questions concerning the domestic jurisdiction of the United States, the application of its law or Constitution, or its domestic policy.

The Jessup Court will be governed by the rules and regulations of the World Court. However, issues regarding these are not raised in the current Problem. Judges should skim the Statute establishing the Court, its jurisdiction and competence. Note that cases brought before the Court include, as here, those involving legal disputes between nation-states.

2. Source Materials

Judges needing familiarity with international law in general should peruse the following: Whiteman, Digest of International Law, Vol. 1, first chapters on sources of law; Beierly, Law of Nations, various editions; the major casebooks on international law, and in particular the introductory chapters dealing with international law as law or with the "sources" of international law; in addition to Beierly (which is brief) other standard textbooks on international law will be useful; and for those who seek more detailed or philosophical treatment, the relevant lectures on the law of war or the use of force given at The Hague and published in the Recueil (a yearly compilation of the proceedings and lectures). The books devoted to the use of force (*e.g.* McDougal and Feliciano, Bowett, Brownlie) and to the law

of war are useful but are too detailed to be recommended to judges who may not have the time to study them.

The goal is to gain familiarity or refresh recollections about international law. To a limited extent, attempt is made in this Handbook to provide the needed background, with the expectation that the judges will be able to work with (or against) the arguments of the participants, or to compel them to provide proper authority for their arguments. Presumably, improper use of authority by one side will be detected by the other, but the judges may need to encourage this sort of contest.

II. THE SOURCES OF INTERNATIONAL LAW

It cannot be emphasized enough that international law is a system of law separate from municipal law. Its rule creation and enforcement mechanisms are quite different from the municipal system, where authority is imposed upon the subjects of a given State by their government.

International law is founded upon the consent of States. Although an evolving concept, it is still very largely the case that States are the subjects of international law. Except in certain extreme situations, or situations in which State conduct threatens the very fabric of the international community, an international legal obligation may not be imposed upon a State without its consent. This is both a cause and a consequence of the system of sovereign equality.

When the International Court of Justice is requested to determine whether a State has committed a delictual act, the Court must first determine whether an international obligation has been violated, because States may engage in whatever activity is not prohibited by international law. Case Concerning the S.S. Lotus (Fr. v. Tur.), 1927 P.C.I.J. Ser. A/B, No. 10.

To ascertain whether a rule of international law exists, the Court looks to Article 38, paragraph 1 of the Statute of the Court, which sets forth the sources of international law. (This article has an identical counterpart in the Statute of the Permanent Court of International Justice, the ICJ's predecessor.) Article 38 provides:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although the sources of international law appear to be listed in a descending order of priority, they are in fact dynamic. This concept is more fully developed below.

A. Treaties As A Source of Law

There are two types of treaties (or conventions): bilateral and multilateral. Bilateral conventions are clearly a source of law as to the two High Contracting Parties. Bilateral treaties are not usually considered a source of general international law when the reason for concluding them was to create an international obligation which did not exist under general international law. Bilateral extradition treaties, by which two States agree, under certain circumstances, to extradite an alleged offender, fall into this category of contract-law. Absent a bilateral agreement, and leaving multilateral conventions aside for the moment, general international law would not usually require the extradition of an alleged offender. (Of course, a State may agree to extradite an alleged offender where no treaty exists, but international law does not oblige a State to do so.) The mere existence of a network of bilateral extradition treaties in and of itself has no general law-creating effect.

On the other hand, multilateral conventions with a large number of States Parties may be a source of international law, either as evidence of what these States declare the law to be among themselves, or by setting forth a new rule of law by implication affecting all States. An example of a multilateral convention which is declaratory, rather than amendatory, of general international law is the set of 1907 Hague Conventions on the Laws of War. These conventions set out many rules of the general international law of armed conflict. Parts of the 1949 Geneva Red Cross Conventions can also be said to codify law observable in the practice of belligerents and their diplomatic correspondence. Thus, all States are bound by many of their substantive law rules, even though a handful of States are not Parties to those instruments. Similarly, the 1948 Genocide Convention declares that genocide violates international law. In this regard, it should be noted that the International Court of Justice in the Case Concerning Reservations to the Genocide Convention (Advisory Opinion), 1951 I.C.J. 15, held that all States were bound to observe the law respecting genocide — not just States Parties — since the Genocide Convention codified rules of international law from which no State may derogate.

In contrast, the General Agreement on Tariffs and Trade creates new rules which cannot be said to have existed under general international law. Its terms are binding only upon States Parties. Perhaps the leading case on third party obligations under contract treaties is the Case Concerning Free Zones of Upper Savoy and the District of Gex (Switz. v. Fr.), 1932 P.C.I.J. Ser. A/B, No. 46, involving a dispute as to France's ability to adjust its customs frontier in light of the 1815 Vienna Conference Final Act. France, of course, was a party to the Act, but Switzerland was not. The Court confirmed the rule that such multilateral conventions bind only States Parties and States which might otherwise have accepted those obligations.

Many multilateral conventions contain both elements. For instance, the Third United Nations Convention on the Law of the Sea declares the existing law with respect to most issues, including "innocent passage," fisheries, "exclusive economic zones," and so forth. In other parts, it creates new law, such as by declaring the seabed and subsoil of the oceans

(outside territorial jurisdiction) to be the "common heritage of mankind." (On this disputed principle, see Larschan & Brennan, "The Common Heritage of Mankind Principle in International Law," 21 Colum. J. Transnat'l L. 305 (1983).

Another convention which contains both elements is the Vienna Convention on the Law of Treaties. In virtually all respects, the Vienna Convention declares the rules of general international law applicable to treaty interpretation, such as the customary international law rule of *pacta sunt servanda* (agreements must be honored) or the general principle of international law *rebus sic stantibus* (fundamental change of circumstances vitiating treaties). However, the Vienna Convention also contains the principle of *jus cogens* (peremptory norms) — a disputed principle of international law which might emerge in due course as an accepted principle or might prove to be a hollow concept. Therefore, when the Court looks to a multilateral convention which is both declaratory and amendatory of international law, it must avoid application of a newly-created international law rule to States which have not — expressly or by implication of their conduct or diplomatic correspondence — consented to be so bound.

As a final point, it should be noted that a conventional obligation need not be written. This was decisive to the Court's holding in the Case Concerning the Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J., Ser. A/B, No. 53. Denmark claimed that Norway was precluded from asserting sovereignty over Eastern Greenland by virtue of assurances given by M. Ihlen, the Norwegian Foreign Minister. The Court found that in July 1919, the Danish ambassador at Christiana informed the Norwegian Foreign Minister that Denmark would not object to Norway's claim to Spitzbergen, then under discussion at the Paris Peace Conference. He also observed that the Danish Government, which was anxious to obtain recognition by all interested Parties of Danish sovereignty over the whole of Greenland, was confident that the extension of Danish political and economic interests to the whole of Greenland "would not encounter any difficulties on the part of the Norwegian Government." On July 22nd, after he had informed his colleagues in Cabinet, M. Ihlen declared to the Danish ambassador (the so-called "Ihlen Declaration") "that the Norwegian Government would not make any difficulties in the settlement of this question." Denmark raised no objection to the status of Spitzbergen, which was granted to Norway.

Norway later asserted sovereignty over a part of Eastern Greenland. The Court concluded that it is "beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs." Thus, the elements of a conventional obligation — consent of the Parties to a particular undertaking — were present and binding, even though unwritten.

In the Case Concerning Nuclear Tests (Aust. v. Fr.), 1974 I.C.J. 253, the Court went further with respect to unilateral acts, stating:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should

> become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

Thus, a State may create an international legal obligation as a purely unilateral matter.

Whether the Court's view is still persuasive is open to question. For a thorough discussion of the effect of unilateral declarations, see A.P. Rubin, "The International Legal Effect of Unilateral Declarations," 71 Am. J. Int'l L. 1 (1977).

B. Custom As A Source of Law

The critical element to the creation of a customary rule of international law is that States generally conduct themselves in a certain way not as a mere policy choice, but because they believe they are bound to do so by international law. For a further discussion, see A. D'Amato, The Concept of Custom in International Law (1971).

States frequently choose to conduct themselves in certain ways because they believe they are bound to do so by international law and that, should they depart from that conduct, a delict is thereby committed. Therefore, the conduct of States can be evidence of a customary international law rule arising from "a general practice accepted as law." This concept was discussed by the International Court of Justice in the *Asylum* case, where the Court observed that:

> The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State [acting] and a duty incumbent in the [other] State.

1950 I.C.J. 266.

In the Case Concerning the Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, the Court found Albania responsible for explosions which occurred when British warships — on maneuvers to exercise the right of innocent passage through the international strait — struck mines in the Corfu Channel off Albania, and held that Albanian sovereignty was not violated by the passage of those ships. With respect to the latter point, the Court noted that it is

> generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent.

> Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.

Before an act or assertion becomes a part of customary international law, it must have been accepted (or at least acquiesced in) for a substantial period of time by States. Thus, in the Case Concerning Anglo-Norwegian Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, the United Kingdom objected to Norway's delimitation of northern Norwegian territorial waters. In upholding the delimitation on the basis of customary international law, the Court noted that

> [t]he general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it . . .. The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.

Thus, the Norwegian assertion, which may have been inconsistent with international law at its inception, had hardened into customary international law by virtue of State practice.

Evidence of custom may be found, *inter alia,* in: diplomatic correspondence, official instructions to diplomatic agents and military officers, acts of municipal legislation and decisions of a State's courts (upon the assumption that they would not knowingly violate an international legal obligation), and the published opinions of legal advisers to governments. It is not unknown that a State may say one thing but conduct itself in a precisely opposite manner. In such a case, the State's conduct is the relevant factor.

C. General Principles of Law As a Source of International Law

International law is based upon the consent of States. This consent may be found in general principles of law as evidenced by a legal principle being contained in the municipal law systems of States. In this sense, near universal private law rules may be indicative of principles of public international law. In the Gentini Case (Italy V. Venez.), Mixed Claims Comm'n (1903), *reprinted in* J. Ralston, Venezuelan Arbitrations of 1903 720 (1904), for example, Venezuela argued that the Italian claim, based upon injury to its national, was barred by prescription. The umpire found that prescription was a part of the law of "civilized nations" and, therefore, was a general principle of law.

Application of a general principle was relied upon in the Case Concerning the Factory at Chorzow (Ger. v. Pol.), 1927 P.C.I.J., Ser. A, No. 9. In the course of finding it had jurisdiction over the matter (involving the Polish Government's expropriation of a factory in Upper Silesia), the Court observed — with respect to the Polish contention that the case should have been brought before the German-Polish Mixed Arbitral Tribunal, although Poland had previously objected to the jurisdiction of that tribunal when the plaintiff company sought relief there — that:

> It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.

Id. at 31.

A State may be bound by the general principle of law respecting estoppel. In the Case Concerning the Temple Preah Viheah (Cam. v. Thai.), 1962 I.C.J. 6, the Court found that an ancient temple lay on the Cambodian side of a boundary which by treaty was to follow a specific watershed but was to be delimited by a mixed commission. The Court emphasized the fact that Thailand (then Siam) had requested from France in 1907 a map indicating the French view of the boundary. The map showed the temple to be on the French Indochina (now Cambodian) rather than the Thai side of the boundary. Thailand failed to raise an objection to the map or the French assertion. The Court thus found that Thailand had acquiesced in the Cambodian assertion of sovereignty for 40 years and was estopped from raising the claim.

Another illustration of a general principle is the international law principle of *rebus sic stantibus*, under which a State may be relieved of its obligation to be bound by the terms of a treaty when there has been a fundamental change of circumstances. This rule of treaty interpretation has its origin in municipal contract law and has been incorporated into public international law. (The principle of *rebus sic stantibus* has been codified in Article 62 of the Vienna Convention on the Law of Treaties.) It also has been applied to international arbitrations between a private party and a foreign State.

The critical element to the recognition of a general principle of law is its existence in most (but not necessarily all) legal systems.

D. Judicial Decisions and Publicists As Sources of International Law

Article 38(1)(d) of the Statute of the Court recognizes judicial decisions and the teachings of the most highly qualified publicists as *subsidiary* means *for the determination of rules* of international law. It therefore differs from the foregoing sources in that Article 38(1)(d) provides the Court with a further mechanism to find a source of international law through judicial decisions and the studied views of the most highly qualified publicists.

1. Judicial Decisions

The judgments of the International Court of Justice and its predecessor, the Permanent Court of International Justice, are but one source of judicial decisions. Also included in this category are the decisions of international arbitral tribunals and the highest courts of States.

Because the international legal system is based upon the sovereign equality of States, from a theoretical point of view there may not exist (without the express consent of States) a rule of *stare decisis*. Additionally, Article 59 of the Statute of the Court, providing that

"[t]he decision of the Court has no binding force except between the parties and in respect of that particular case," is an international adoption of the principle of *res judicata*, and is itself irrelevant to the persuasiveness of prior opinions. It should be noted that any court can overrule itself, but the ICJ does so rarely for the same reasons that the U.S. Supreme Court does so rarely. Reasoned ICJ decisions are highly persuasive, even though not technically binding. The Court thus may be influenced by its own reasoning in previous cases, even though it is not so required, and decide cases in a manner consistent with the rule of *stare decisis*. It should be noted that municipal law courts are not bound to accept ICJ decisions unless the municipal legal order translates treaty commitments into municipal law.

Finally, the Court may look to the decisions of international arbitral tribunals and the highest courts of States as evidence of a rule of international law. If a large number of these municipal courts are in agreement — and if there is little or no similar authority holding to the contrary — the Court may conclude that the municipal judicial decisions reflect the position of States or general principles of law recognized by civilized nations.

2. Publicists

The Court also may look to publicists as a subsidiary source of law, not for their opinions on what the law should be, but rather as a statement of what norms constitute customary international law. Perhaps the best formulation of this principle was set forth by the Supreme Court of the United States in The Paquete Habana, 175 U.S. 677 (1900), in which it observed that

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Only a few publicists rise to the level of a source (albeit subsidiary) of international law. While Article 38(1)(d) refers to "the most highly-qualified publicists," it is not always easy to discern which scholars rise to this level.

E. Hierarchy of the Sources of International Law

The sources of international law are not to be applied based upon a rigid hierarchical conception. While a treaty is generally the clearest indication of the consent of States, from the moment a treaty enters into force States may begin the process of modifying its terms by subsequent practice. After a certain period of time, it would be difficult to conceive of the treaty as the appropriate source of law if State practice has been consistently different.

In the same vein, a general principle of law may emerge over time which conflicts with a treaty. In such a situation, the Court would attempt to determine which source of law

most clearly reflects the consent of States. Take, for instance, the situation in which two States concluded a treaty in 1800 permitting the trade in slaves. By 1900, nearly all States had abolished slavery within their territory by municipal law, and there is much evidence that slavery was universally condemned on legal as well as moral grounds. The Court, therefore, undoubtedly would find the 1800 treaty unenforceable by virtue of general principles of international law.

Finally, it should be noted that should a new peremptory norm of general international law (*jus cogens*) emerges, the norm would render an inconsistent treaty obligation a nullity. This principle is set forth in Article 64 of the Vienna Convention on the Law of Treaties, which provides: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."